IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 535

LEON JOSEPHSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

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INDEX

CITATIONS

Cases:

Miscellaneous:

Notes:

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Leon Josephson, prays for a rehearing and reversal of the order hereinbefore entered on the 16th day of February, 1948, denying his petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. This petition for rehearing is based upon a substantial ground available to petitioner although not previously presented.

The Circuit Court below held that the petitioner did not have available to him the claim that Public Law 601 violated the provisions of the Fifth and Sixth Amendments to the Constitution (R. 207). In addition, it doubted that petitioner was sufficiently injured to raise the claim that the authorizing statute violated the First Amendment (R. 212), but it resolved that issue in petitioner's favor and discussed the merits (R. 212-215).

In the petition filed with this Court for a writ of certiorari, we limited our discussion, therefore, as far as the right of the petitioner to question the validity of the Committee was concerned, to a discussion of his right to make the claim that the statute violated the due process provisions of the Fifth Amendment and the pertinent provisions of the Sixth Amendment (Petition, p. 7, Question No. 9; Petition, Point 3, pp. 9-10; Brief, subd. (f), p. 22). We did not present the separate and distinct ground, sustaining the petitioner's right to assert the claim that the statute violated the First Amendment, because that matter, we believed, had been resolved sufficiently in our favor by the Court below.

If this Court is of the view that petitioner is not in the position to question the validity of the statute so far as the Fifth and Sixth Amendments are concerned, it should nevertheless sustain, it is respectfully submitted, petitioner's right to assert the invalidity of the statute under the First Amendment to the Constitution.

In *McGrain* v. *Daugherty*, 273 U. S. 135 (1927), the Government was represented by Attorney General Harlan F. Stone, later the Chief Justice of this Court. In his brief before this Court (p. 74), and in his argument before this Court (*supra*, p. 144), the Attorney General stated

> "Appellee, by refusing to appear in response to either subpoena and be sworn to testify, can only succeed in this case by establishing that the entire proceeding was void, as beyond the constitutional powers of the Senate."

Here we have an explicit admission by the Government that a witness who refused to be sworn and testify could raise, indeed, could *only* raise the question of the validity of the proceedings. *Daugherty* claimed that the Senate had exceeded its constitutional powers by authorizing an inquiry in aid of legislation. The petitioner here claimed

that the House had exceeded its constitutional powers by authorizing a limitless inquiry solely into opinion and belief, an inadmissible and unlawful object under the Constitution.

The petitioner made the claim that the Committee was without jurisdiction, that its proceedings were void and its process, therefore, a nullity.

If a citizen is compelled by subpoena to leave his home or business to attend a proceeding before a legislative committee whose avowed aims are "exposure" and "pitiless publicity," it is clear, it is respectfully submitted, that he suffers an injury sufficient to raise the constitutional issue. For the petitioner is not a "stranger" to this Committee. It must be remembered that the contempt statute (Title 2, United States Code, Section 192), was invoked against him and he has been sentenced to fine and imprisonment under it. He has suffered no less an injury than the defendant in *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), or the defendant in *Thomas* v. *Collins,* 323 U. S. 516 (1945). *Cf. Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925).

We respectfully submit in the light of the decisions in *McGrain* v. *Daugherty, supra* (and Mr. Justice STONE's argument before this Court when he was Attorney General), *Thornhill* v. *Alabama, supra,* and *Thomas* v. *Collins, supra,* that petitioner had the right to assert that Public Law No. 601 violated the provisions of the First Amendment, and that the proceedings of the Committee were, therefore, void.

We further submit, respectfully, that this issue alone—the right to assert the claim of unconstitutionality—poses a novel issue of public importance, an issue which should be decided by this Court, for the applicable decisions appear to support petitioner's right to assert the claim.

Conclusion

This Court has stated that "under our constitutional system, courts stand against any winds that blow . . ." (*Chambers* v. *Florida*, 309 U. S. 227, 241, 1940). This Court, it has been declared, should not permit "its claim to guardianship of free speech and press "to become a hollow one" (*Thomas* v. *Collins*, 323 U. S. 516, 547, 1945). Grave issues affecting the civil liberties of the entire people are involved here. The Bill of Rights is at stake. At least, such was the view of Judge CLARK in his painstaking and sober opinion in the Court below. The view is receiving growing support from public citizens (*Henry Steele Commager, Who Is Loyal to America?, Harper's Magazine*, September 1947), and from the Bar (Note, *14 University of Chicago Law Review* 265 (Feb., 1947); Note, *47 Columbia Law Review* 416 (April, 1947); *Gellhorn, Walter, Report on a Report of the House Committee on Un-American Activities, 60 Harvard Law Review* 1193 (October, 1947); Note, *96 University of Pennsylvania Law Review* 381, (Febuary, 1948). If this Court does not speak out, there is danger that the inquisition here established into the beliefs and faiths of citizens will soon be emulated on a wide scale by state and local officials of government. The "Loyalty Order," "subversive lists," "loyalty checks," "alien roundups without bail" all are straws in the wind—a developing hysteria and oppression where freedom cannot prevail. The courts of the land, now more than ever, need the strength, the advice and guidance of the supreme interpreters of the Constitution. We urge this Court to permit us to come before it and fully discuss the most crucial constitutional issue affecting the country in over two decades.

WHEREFORE, it is respectfully prayed that this petition for rehearing be granted and that the order of this Court

denying the petition of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be reversed, and the petition granted.

February, 1948.

LEON JOSEPHSON,
Petitioner.

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Of Counsel.

Certificate

We hereby certify that the foregoing petition is presented in good faith and not for delay, and that the foregoing petition is restricted to a sustantial ground available to petitioner although not previously presented, in accordance with Rule 33, paragraph 2 of the Rules of this Court.

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